Supreme Court, U.S.
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NO. 88-603

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

STATE OF ARIZONA,

Petitioner,

-vs-

CONRAD MARION FLINT,

Respondent,

ON WRIT OF CERTIORARI TO THE
ARIZONA COURT OF APPEALS

SUPPLEMENTAL BRIEF IN REPLY TO AMICUS BRIEF

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ARGUMENT FOR GRANTING THE WRIT

1. THE STATUS QUO

In the amicus brief, the Government correctly states that "Federal investigative agents, prosecutors, and courts often are much farther from the scene of an on-reservation crime than are their state and local counterparts." (Amicus Brief at 6-7.) This distance imposes a severe burden on victims, witnesses, and the entire judicial process. This problem, and others, raise the question of the adequacy of the federal response to reservation crimes committed by non-Indians against Indians. U.S. Comm'n on Civil Rights, Indian Tribes: A Continuing Quest for Survival 175-76 (1981). The case before the court is a prime example of the problems facing the Indian tribes under the status quo.

Flint, a non-Indian, was a licensed school teacher with the State of Arizona, and was employed by the Kayenta School District. The Kayenta School District is authorized and funded by the State of Arizona. The Kayenta

School District leased property from the Navajo Nation to provide education to the Indian children. Flint met and developed contacts with various Indian boys through his position as a teacher with Kayenta. Flint invited Indian boys to his apartment where he molested them. Flint's apartment was located on the land leased by Kayenta. Arizona authorities were notified of Flint's activities. Arizona seized, pursuant to a warranted search of Flint's apartment, 2,000 to 3,000 photographs and slides and 29 VHS tapes depicting various sexual encounters between Flint and his victims. The Arizona prosecuting agency investigating the allegations notified the United States Attorney's Office in Phoenix of the situation. Pursuant to the United States Attorney's Manual § 9-20.215 (1985)[1], the

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1. See also Policy Concerning State Jurisdiction over certain offenses on Indian Reservations. Addendum to United States Attorney's Manual § 9-20.215 dated February 11 1986.

federal government declined to handle the case until after Arizona finished with its state prosecution. On August 7, 1986, the Arizona trial court dismissed the state charges and ordered that Flint be released from state custody. Arizona immediately notified the United States Attorney's Office of the trial court's decision, and insisted that the federal government take action. Then, and only then, did the federal government begin any action against Flint.[2]

The federal government concedes in the amicus brief that Arizona has a strong

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2. The Government makes much of the fact that Flint was subsequently prosecuted by the United States Attorney's office after the charges were dismissed by the Arizona court. What is curious by its absence is the fact that Arizona agreed to drop its prosecution of Flint if the United States Attorney would agree to give Flint the same plea offer made by Arizona in state court. The United States Attorney's office refused to do so, and agreed to a lesser disposition with Flint. The irony of this case is that the only official elected by the Indians to review this case, the Arizona County Attorney, would be precluded from determining if the Indian's interest was adequately protected if the amicus position was accepted by this Court and certiorari denied.

interest in enforcing its criminal laws against non-Indians who commit crimes against children of its Indian citizens[3], and that the exercise of state jurisdiction would not interfere with the federal or tribal interests.[4] (Amicus Brief at 3.) The Government likewise states that concurrent jurisdiction is commendable as a matter of public policy.[5] (Id. at 5.) Finally, the amicus brief notes that because of these concerns it has been the official United States position for nearly 10 years that the states do have concurrent jurisdiction with

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3. This court has specifically noted the particular and compelling state interest in prosecuting those individuals who commit crimes against children. New York v. Ferber, 458 U.S. 747 (1982).

4. See also Rothe v. United States, 354 U.S. 476, 493-94 (1957) (concurrent state action is not preempted unless it interferes with or burdens the federal function).

5. See also Smith v. United States, 431 U.S. 291, 306 (1977) (concurrent prosecuting jurisdiction encouraged as the resources of any one agency should go to that area deemed to have the greatest priority).

the federal government to prosecute crimes committed by non-Indians against Indians in Indian Country. (Id. at 7-8.) The Amicus then states that the Government's official position has now changed because of this Court's request for the views of the United States. (Id. at 8.)

The fact that the Government has many different official positions on this issue underscores the Civil Rights Commission's report on the failure of the federal response to reservation crimes. Likewise, the old official position is precisely the reason the instant case was initially brought in state court. The instant case underscores the inadequacies of allowing the federal government to have exclusive jurisdiction to prosecute these types of cases when the states are better equipped to handle the cases, and have just as strong an interest in seeing that the non-Indian perpetrators be brought to justice. Contrary to the amicus' position,

the status quo is not acceptable and warrants this Court's time in reviewing the instant case.

2. THE ISSUE OF WHETHER THE STATES HAVE CONCURRENT JURISDICTION TO PROSECUTE CRIMES COMMITTED IN INDIAN COUNTRY BY NON-INDIANS, HAS NEVER BEEN DECIDED BY THIS COURT AND WILL CONTINUE TO BE THE SUBJECT OF OFFICIAL FEDERAL POSITIONS AND DEBATE UNTIL THIS COURT RULES ON THE MERITS OF THE CLAIM.

In the amicus brief, the Government recognizes that the issue presented by the Petition is "difficult." (Amicus Brief at 8.) The Government also recognizes that this Court has yet to rule on the merits of the claim. (Id. at 3.) The Government recommends that this Court deny the Petition because the congressional and executive branches of government have relied on dicta from this court indicating that the federal jurisdiction is exclusive. (Amicus Brief at 3.) The Government position is in error.

From the discussion above, it is clear that the executive branch has not relied on this Court's dicta in formulating its Indian jurisdiction policy. See United States

Attorney Manual § 9-20.215 (1985). For the last 10 years, the official position of the United States government has been that this Court had not ruled on the issue, and the better policy was to allow the states to exercise what was believed to be their concurrent jurisdiction first. Id. The instant case arose in state court because of the Government's position. Clearly, there has been no reliance by the executive branch on this Court's dicta.

Likewise, the argument that the legislative branch has relied on language from this Court in formulating legislation is not persuasive. In Blue Jacket v. Board of Commissioners of the County of Johnson (Kansas Indian Case), 72 U.S. (5 Wall.) 667 (1867), this Court found that the Kansas treaty specifically excluded state jurisdiction to prosecute non-Indians. After this Court held that the treaty and acts of Congress excluded crimes committed against Kansas Indians by non-Indians from the jurisdiction of the Kansas courts, Congress

enacted legislation conferring on Kansas concurrent jurisdiction over criminal acts committed by non-Indians against Indians. 18 U.S.C. § 3243. By conferring concurrent criminal jurisdiction on Kansas, Congress did nothing more than place Kansas in the same position as that enjoyed by all states. The only other legislation pointed to by the amicus as indicative of Congressional intent is Public Law 83-280. (Amicus Brief at 13.) The amicus claims that Congress must have intended to preclude state jurisdiction or it would have been unnecessary to provide that state jurisdiction could be extended to "offenses committed by or against Indians," since "by" alone would have been effective to divest the United States of exclusive jurisdiction of the Major Crimes Act. (Id. at 13-14.) What the amicus' argument overlooks is that the tribal courts have exclusive jurisdiction over offenses not enumerated in the Major Crimes Act committed by Indians "against" Indians. 18 U.S.C. § 1152.2; Ex

Parte Crow Dog, 109 U.S. 556 (1983). Public Law 83-280 was designed not only to allow for the shift of federal responsibility for major crimes to the states, but also to have the states undertake responsibility for the minor offenses that the tribes were unable to deal with effectively. Washington v. Confederated Bands and Tribes of Yakima Indian Nation, 439 U.S. 463, 471, 488 n.32, 489 n.33 (1979). It was the minor crimes, not those committed by non-Indians, that required use of the word "against." There is no evidence of Congressional reliance on this Court's dicta.

CONCLUSION

The denial of certiorari will forever preclude this Court from reviewing and addressing the merits of petitioner's claim. Arizona believes that the dicta of this Court in previous cases should not be the basis for divesting the state of its authority to monitor and protect the interests of its

Indian citizens. Arizona prays this Court will grant the Petition and settle this issue on the merits.

DATED this 10th day of June, 1989.

Respectfully submitted,

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A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

PAUL J. McMURDIE, a member of the Bar of this Court, being duly sworn upon oath, deposes and says:

That he served three copies of the Supplemental Brief in Reply to Amicus Brief upon Jon Sands, Federal Public Defender, 3020 North Central, Suite 200, Phoenix, Arizona, 85004, Attorney for Conrad Marion Flint, by depositing the same in the United States Mail, with first class postage prepaid, return receipt requested.

DATED this 19th day of June, 1988.

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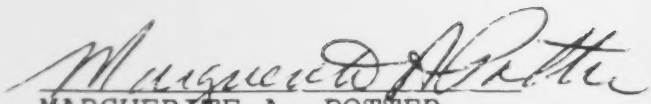
SUBSCRIBED AND SWORN to before me

this 19th day of June, 1989.



MARGUERITE A. POTTER
NOTARY PUBLIC

My Commission Expires:

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